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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-

UNITED STATES OF AMERICA, PETITIONER

v.

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 30, 1971.

OPINIONS BELOW

The opinion of the district court (App. A, *infra,* pp. 1a–7a) is not reported. The opinion of the court of appeals (App. B. *infra,* pp. 15a–18a) is reported at 453 F.2d 360.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* p. 19a) was entered on December 30, 1971. On March 29, 1972, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and

including April 28, 1972, and on April 20, 1972, he granted a further extension to and including May 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Pursuant to the Migratory Bird Conservation Act, the United States acquired land in Louisiana for a wildlife refuge by deed and by condemnation. The mineral rights were reserved to the former owners for a ten-year period (subject to extension if certain conditions regarding exploration and production were met), after which such rights were to vest in the United States. The ten-year period expired without the conditions for extension being met. The claim sustained below is that an intervening statute of Louisiana (Act 315 of 1940), passed after the United States acquired the land in question and providing that mineral rights reserved in land conveyances to the United States shall be "imprescriptible," had the effect of extending indefinitely the former owners' mineral reservations.

The question presented on these facts is whether the Louisiana statute, if applicable, can constitutionally be applied to defeat the government's valuable right to the minerals. Included subsidiary questions are:

1. Whether Louisiana Act 315, as construed and applied by the court below, is invalid under the Supremacy Clause, the Property Clause, the Contract Clause or the Fourteenth Amendment of the Federal Constitution.

2. Whether federal law, rather than state law, governs the property rights of the United States in lands acquired under the Migratory Bird Conservation Act.

3. Whether the reservations of mineral rights in question, construed under state or federal law, are within the provisions of Louisiana Act 315.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

> Article I, Section 10, clause 1:
>
> No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * * .
>
> Article IV, Section 3, clause 2:
>
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.
>
> Article VI, clause 2:
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> Fourteenth Amendment, Section 1:
>
> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act 315, Louisiana Statutes of 1940 (LSA–RS 9:5806) (Cum. Supp.) provides in pertinent part:

> A. When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, * * * the rights so reserved * * * shall be imprescriptible.
>
> * * * * *

The pertinent provisions of the Migratory Bird Conservation Act of February 18, 1929 (45 Stat. 1222, as amended, 16 U.S.C. 715, *et seq.*) and of Act No. 12, Louisiana Statutes of 1892, are set forth in Appendix E, *infra*, pp. 38a–42a.

STATEMENT

The United States initiated this litigation to quiet title in it to lands in Louisiana which it had purchased or condemned pursuant to the Migratory Bird Conservation Act for the Lacassine Wildlife Refuge.[1] The conveyances to the federal government reserved the mineral rights to the former owners. By their terms, the reservations subsequently expired and the mineral rights vested in the United States. The former owners or their successors in interest (collectively referred

[1] The United States brought two separate suits for this purpose, under 28 U.S.C. 1345, which were consolidated pursuant to Rule 42(a), Fed. R. Civ. P. (App. A, *infra*, pp. 7a–8a).

to herein as Lake Misere) claimed that Louisiana Act 315 made the provisions for the extinguishment of the reservations inoperative, and that therefore they owned the mineral rights. The district court concluded that the issues involved had been resolved in favor of Lake Misere's claim in *Leiter Minerals, Inc.* v. *United States*, 329 F. 2d 85 (C.A. 5), certiorari granted and judgment vacated with directions to dismiss as moot, 381 U.S. 413. Accordingly, it granted summary judgment for Lake Misere. The court of appeals affirmed *per curiam* on the authority of its *Leiter Minerals* decision.[2]

1. *The present case.* The material facts were stipulated in the district court.[3] The United States acquired approximately 12,625 acres of land in Cameron Parish, Louisiana, by purchase on July 23, 1937, and by a condemnation judgment entered on January 25, 1939 (App. A, *infra*, pp. 7a–8a). The deed of purchase reserved "unto [the] vendor * * * all the oil, gas, sulphur and other minerals in, or on under said land, * * * for a term of ten years from the date [hereof] * * * and as long thereafter as * * * mineral is produced from said land, or so long thereafter as vendor shall conduct drilling or reworking operations * * * " (*id.* at pp. 9a–10a). It was provided

[2] The government brought the present suit in an effort to resolve the issues which were left open when *Leiter Minerals* became moot. Since the decisions in this case were based on the court of appeals' decision in *Leiter Minerals*, that litigation is discussed in some detail at pp. 7–10, *infra*, and the court of appeals' opinion in that case (329 F. 2d 85) is set forth in App. D, *infra*, pp. 20a–37a.

[3] The stipulation is appended to the district court's opinion (App. A, *infra*, pp. 7a–14a).

that "at the end of said ten-year period of reservation, if not extended * * *," the reservation of minerals "shall terminate * * *, and the complete fee title to said lands shall thereby become vested in the United States" (*ibid.*). The judgment of condemnation contained a mineral reservation in favor of the prior owners which was identical in relevant part (*id.* at pp. 11a–12a).

None of the conditions that would extend the term of the reservations occurred during the ten-year period (App. A, *infra,* pp. 10a, 12a). In 1955, after the mineral rights had vested in the United States under the terms of the reservations, the United States issued oil and gas leases covering the lands in question. Lake Misere continued to claim the mineral rights, however, and executed various contracts in which it asserted that it owned such rights (*id.* at pp. 12a–13a).

The district court found that the provisions of the reservations concerning the period thereof indicated that "the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitudes" (App. A, *infra,* p. 6a). It concluded that "the Fifth Circuit's 2–1 decision in *Leiter Minerals,* 329 F. 2d 85, is dispositive of the issues involved in this litigation," and that, despite the fact that the Supreme Court had vacated that decision, it was "obligated to follow Leiter Minerals" (*id.* at p. 6a). Since *Leiter Minerals* had determined that Louisiana Act 315 made prior contractual prescriptions ineffectual to extinguish a mineral reser-

vation, the court sustained Lake Misere's claim and entered summary judgment for it.

The court of appeals affirmed the district court's judgment "on the basis of the principles enunciated * * * in *Leiter*" (App. B, *infra*, p. 17a). It rejected the government's contentions that Louisiana Act 315 as construed and applied here was unconstitutional in that it impaired obligations of contract, derogated from the federal government's supreme power to acquire a precise estate by condemnation or by purchase, and discriminated against the United States in its land acquisitions (*id.* at pp. 17a–18a).

2. *Leiter Minerals.* The relevant facts in the present case closely parallel those in *Leiter Minerals*, and the legal issues presented there were the same as those involved here.

In 1938, the United States purchased certain lands in Plaquemines Parish, Louisiana, for a wildlife refuge under the provisions of the Migratory Bird Conservation Act. The deed of purchase contained a mineral reservation similar to the reservations in the present case, and, as here, the reservation expired according to its terms and the mineral rights vested in the United States. Both the United States and the former owner (Leiter) issued oil and gas leases covering the lands in issue.

The Leiter interests, claiming that they owned the mineral rights, brought suit in a Louisiana state court against the government's lessees. This claim was based on the provision of Louisiana Act 315 (*supra*, p. 4), that "when land is acquired * * * by the United States * * * [and] minerals or royalties are reserved * * *

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the rights so reserved * * * shall be imprescriptible," which, it was contended, had the effect of extending Leiter's mineral reservation in perpetuity. The United States then instituted an action to quiet title in federal court. The federal district court, at the government's request, enjoined the state court proceedings (204 F. Supp. 560 (E.D. La.)), and the court of appeals affirmed the injunction (224 F. 2d 381 (C.A. 5)). This Court granted certiorari; it modified the injunction "to permit an interpretation of the state statute [Louisiana Act 315] to be sought * * * in the state court," and with that change, affirmed (352 U.S. 220, 230).

A declaratory judgment proceeding was initiated in state court for this purpose, and ultimately reached the Supreme Court of Louisiana (*Leiter Minerals, Inc.* v. *California Co.*, 241 La. 915, 132 So. 2d 845). That court held that Louisiana Act 315 applies retroactively to mineral reservations outstanding when the statute was enacted (in 1940), although they were created before that date, and applies "to prescription whether established by statute or by contract" (241 La. at 940, 132 So. 2d at 854). The statute controls, however, only with respect to reservations establishing a mineral servitude "of uncertain and indefinite duration"; if the servitude is "for a certain time or of specified duration * * * then Act 315 of 1940 is not applicable * * * " (241 La. at 938, 935, 132 So. 2d at 853, 852). The court summarized its view of the Act as follows (241 La. at 942–943, 132 So. 2d at 854–855):

> First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for a definite, fixed, and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as [1] not establishing a servitude for a fixed, definite and certain time, and if it is decided [2] that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act 315 of 1940 is applicable and constitutional. The interpretation of the contract [the reservation] is for the United States courts.

The federal district court (Judge J. Skelly Wright) then decided the merits of the government's quiet title action (204 F. Supp. 560). It held that the reservation "provides a definite term" for the mineral servitude created thereby (*id.* at 567). Thus, "[u]nder the ruling of the Louisiana Supreme Court, * * * the reservation was not affected by Act 315 of 1940," and "the servitude expired by its own terms and the mineral rights reverted to the United States" (*ibid.*). It was, accordingly, unnecessary for the court to resolve the government's contentions regarding the constitutionality of Act 315.

The court of appeals reversed (329 F. 2d 85; App. D, *infra*). It rejected the government's contention that federal law controlled the rights of the United States under the reservation, and held, instead, that those rights were to be determined by reference to the law of Louisiana. It was the court's opinion that the Lousiana Supreme Court had indicated that

"Leiter's servitude was one of indefinite duration," and it agreed with that view (App. D, *infra,* p. 29a). Under state law, therefore, the reservation "provide[d] for a contractual prescription for the conditional extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes" (*id.* at p. 35a). As to the government's contention that as so construed the Louisiana statute unconstitutionally impaired its contract, the court said that the discussion of that matter in its prior decision in *United States* v. *Nebo Oil Co.,* 190 F. 2d 1003, and in the Louisiana Supreme Court's *Leiter* opinion (241 La. at 941–942, 132 So. 2d at 854) made it "unnecessary further to labor" this point. Judge Gewin dissented, and would have affirmed the district court's ruling for the reasons set forth in its opinion (App. D, *infra,* pp. 36a–37a).

REASONS FOR GRANTING THE WRIT

The decision below raises important questions regarding the interrelationship of state and federal law in the federal government's land transactions, the applicability of the Louisiana statute (Act 315) to the facts of this case, and the constitutionality of the statute as applied. The court of appeals, adhering to the views expressed in its *Leiter Minerals* decision, held that the government's rights under the mineral reservations in question are determined by state rather than federal law, and that Act 315 applies to the reservations as construed under state law to make their provisions for extinguishment of the reserva-

tions inoperative.[4] The court further ruled that Act 315 was not unconstitutional as thus applied. These several holdings are destructive of settled principles of federal land law and of constitutional law reflected in decisions of this Court and of other courts of appeals. If permitted to stand, the decision would have far-reaching effects on valuable mineral rights in Louisiana which the United States has acquired, and (in principle) on other federal land interests and transactions.

1. The chief questions requiring resolution by this Court are the constitutional issues presented by the application of Louisiana Act 315 to abrogate the rights acquired by the United States under the express terms of the mineral reservations. In our view, the decision below offends the Constitution for three independent reasons. First, the decision violates the Property and Supremacy Clauses by subjecting the interests of the United States in land to disposition by a State and to the idiosyncracies of local land law. Second, Act 315, as applied, impairs the obligations of contracts in violation of Article I, Sec. 10. Third, the statute impermissibly singles out the United States for hostile discrimination in the acquisition of interests in lands.

[4] In Louisiana, there can be no separate estate in minerals, apart from ownership of the surface. The most that may be granted (or reserved) is a right to explore for and extract the minerals—a so-called "servitude"—which expires automatically by the force of "prescription" if it is not exercised for 10 years. Thus, under state law private parties cannot validly stipulate that a mineral interest shall survive more than a decade of inactivity. The effect of Act 315 is to suspend the operation of the law of prescription when the landowner sells to the United States and reserves the minerals; his right to extract the minerals is made "imprescriptible."

A. The Property Clause vests in Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." Article IV, Sec. 3, cl. 2 (*supra,* p. 3). The Supremacy Clause prescribes that the Constitution and the laws and treaties duly made by the United States "shall be the supreme Law of the Land * * *." Article VI, cl. 2 (*supra,* p. 3). These provisions preclude application of Louisiana Act 315 in this case to limit or change the rights of the United States in lands acquired by it.

The United States acquired the lands in issue here pursuant to federal statutes—the Migratory Bird Conservation Act (App. E, *infra,* pp. 38a–42a)—empowering it to do so in furtherance of a national program for the protection of wildlife. Although these statutes prohibit acquisitions "unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State" (*id.* at p. 40a), Louisiana had given its general consent to acquisitions by the federal government in 1892 (Act No. 12, Louisiana Statutes of 1892, App. E, *infra,* pp. 42a). It was contemplated that acquisitions under the Migratory Bird Conservation Act might involve reservations and other encumbrances in favor of the former owner (see Sec. 715e of the Act, App. E, *infra,* pp. 39a–40a); indeed, the Act was amended to make it clear that reservations could be set forth in the conveyance. See H. Rep. No. 886, 74th Cong., 1st Sess., p. 2 (1935).

There is no doubt that the conveyances to the government in this case, which contained carefully worded

mineral reservations specifying, *inter alia,* the circumstances in which the mineral rights would vest in the United States (see *supra,* pp. 5–6), were proper in all respects. The lands thus became part of the federal domain, and thereby subject to the plenary and exclusive control of Congress under the Property Clause. See *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 294–295; *Alabama* v. *Texas,* 347 U.S. 272, 273–274; *United States* v. *San Francisco,* 310 U.S. 16, 29–30; *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 404–405. After that, only the federal government could make rules and regulations with respect thereto, and state law could not infringe on that power. *United States* v. *Allegheny County,* 322 U.S. 174, 182–183. The court below, however, held that a state statute enacted several years subsequent to the conveyances to the United States governs the federal government's property rights. Under the court's holding, the Louisiana statute reduces the property interests that the United States received under the conveyances by abrogating the agreed terms of the reservations. This plainly constitutes a disposition of federal property by the State—a result squarely in conflict with the Property Clause, which confers on Congress, rather than the States, the "Power to dispose of * * * the Territory or other Property belonging to the United States * * *."

Moreover, the decision below conflicts with the statutory scheme under which the government acquired these lands. While reservations like those involved here are permitted, the Migratory Bird Conservation Act provides that such reservations "shall

be subject to rules and regulations prescribed by the Secretary of the Interior," and "shall be subordinate to and subject to such rules and regulations as are set out in [the conveyance] * * * or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time" (Sec. 715e of the Act, App. E, *infra,* pp. 39a–40a). This leaves no room for state regulation. Rather, Congress intended that if reservations were used in conveyances to the United States, they should have federally-defined consequences without regard to the vagaries of state law.[5] The Supremacy Clause forbids the application of the Louisiana statute in these circumstances. See *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 295; *California Commission* v. *United States,* 355 U.S. 534, 544; *United States* v. *Allegheny County, supra,* 322 U.S. at 182–183; cf. *Paul* v. *United States,* 371 U.S. 245.[6]

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[5] Section 715f of the Act, specifying that the states must give their consent before the United States can make acquisitions (App. E, *infra,* p. 40a), does not indicate an intention to subject the acquisitions to the peculiarities of local land law. As already pointed out (*supra,* p. 12), Louisiana has consented to federal acquisitions. Having done so, the state has no further power with respect to acquisitions made as authorized by federal law. See the district court's opinion in *Nebo Oil* (90 F. Supp. 73, 89–92 (W. D. La.)), reviewing the long-standing position of federal officials that state law no longer applies to lands acquired by the federal government for forest purposes.

[6] Placing the responsibility in the Secretary of the Interior to determine whether to use reservations and, if so, what they should provide, gives federal authorities the flexibility needed to assure that land requirements for projects can be met. This

B. The Contract Clause specifies that no State shall pass any law "impairing the Obligation of Contracts." Article I, Sec. 10, cl. 1 (*supra*, p. 3). Louisiana Act 315, as applied below, abrogates the express terms in the conveyances for the extinguishment of the mineral reservations. This clearly impairs the obligation of the government's contracts.

The deed of purchase and the condemnation judgment in this case are unambiguous: the former owner retained a right to explore for and extract the minerals, and that right would expire in 10 years unless certain requirements had been met to extend the term. Those requirements were not met, and under the terms of the conveyances the mineral rights which the

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may mean, as in the present case, that the government must settle for only the surface rights temporarily, with the mineral rights reserved to the former owner for a specified term. This form of reservation accommodates the interests of both seller and buyer. The former often wants an opportunity to explore for minerals, while the latter may be willing to forego the mineral rights for a specified time to reduce purchase costs. The United States uses a similar provision fixing a cut-off date for the period in which lessees of federal lands can explore for minerals (see the Mineral Leasing Act of 1920, as amended, 41 Stat. 437, 443, 30 U.S.C. 226). The restrictions which the reservations impose on the rights of the former owners to extract minerals are all the more important in this case. The lands were acquired for and are being used as a game refuge, and, unless carefully regulated, mineral development might well pose grave threats to this use. Compare 43 C.F.R. (April 1, 1964 Supp.) 3120.3–3, under which the leasing of refuge lands is generally barred. It is thus important to implementation of the policy objectives of the Migratory Bird Conservation Act that mineral reservations in government acquisitions of lands for wildlife refuges be limited to their express terms, rather than expanded, as under the decision below, by state statute.

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former owners had reserved "terminate[d]" and "the complete fee title to said lands * * * [did] thereby become vested in the United States" (*supra*, p. 6).[7]

The property interest thus provided in favor of the United States had a double benefit. Not only would the right to the minerals fully vest in the government if the former owners did not satisfy the conditions set; equally important, the United States would then be secure against any disturbance in its exclusive possession of these lands for use as a game refuge. The United States bargained for this provision and it was clearly agreed to in the conveyances and thus reflected in the consideration paid by the United States to the former owners. Yet the court below, as it did in *Leiter*, ruled that the later-enacted Louisiana statute effectively erased this provision by rendering it inoperative. That result, we submit, violates the guarantee of the Contract Clause. See *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426; *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393; *Barnitz* v. *Beverly*, 163 U.S. 118. Compare *El Paso* v. *Simmons*, 379 U.S. 497; *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398.

C. Louisiana Act 315 as applied below singles out the United States and its lessees for hostile discrimination in the acquisition of interests in land. Although others acquiring land can specify and pay for

[7] Thus, here as in *Leiter Minerals*, the government's property interest in the mineral rights flows directly from the conveyances, in contrast to the situation in the court of appeals' earlier decision in *Nebo Oil*, on which that court mistakenly relied in its opinion in *Leiter Minerals* (see *supra*, p. 10).

a period of contractual prescription for mineral reservations, the United States cannot. As the federal district court pointed out in *Leiter Minerals* (204 F. Supp. at 563), "this discrimination directed against the federal government and its lessees" raises a substantial question under the Equal Protection Clause of the Fourteenth Amendment.

There is no rational basis for drawing the distinction made in Act 315. The Louisiana Supreme Court in its *Leiter* decision (241 La. at 932–934, 132 So. 2d at 851–852) explained that the purposes of the Act were to eliminate difficulties which the federal government had encountered in acquiring lands by permitting its grantors to reserve the minerals without application of the state prescription statute, and to retain state control over the minerals so that the state could tax and apply its conservation measures to them. The statute goes too far as concerns the first matter; while it frees the United States and its grantors from statutory prescription, it also bars prescription by contract. There is no reason why the United States should not be allowed to contract for prescription if it wishes, like any other vendee. Nor does the Act really serve the other suggested objects, revenue and conservation. The United States is not prohibited from acquiring mineral rights, but instead only from acquiring them under a contract which gives the former owner an initial period for exploration and production—a type of contract designed to encourage exploration of the minerals by the former

owner, who would be liable to taxation and state conservation regulations.*

To be sure, there are no federal appellate decisions holding that the United States is a person entitled to the protections of the Fourteenth Amendment. Indeed, this Court characterized this proposition as "somewhat dubious" (*United States* v. *Burnison,* 339 U.S. 87, 95). But it is well established that a State cannot discriminate against federal interests (including federal lessees), and that, we submit, is clearly the result of the decision below. See, *e.g., Moses Lake Homes* v. *Grant County,* 365 U.S. 744.

2. The decision below is disturbing as a precedent regarding the property interests the federal government has in lands which it owns. By reaffirming *Leiter Minerals,* the court also reaffirmed the proposition there expressed (329 F. 2d at 90) that "State law must govern in the absence of a federal statute making federal law applicable." Thus, unless Congress explicitly provides otherwise, each state is free not only to impose whatever restrictions it will on the manner and extent of land acquisitions the national government can make, but also to reduce the federal government's interest in property already acquired by altering local land laws. Under this view

* The fact that mineral reservations in conveyances to agencies of the state government are also made imprescriptible (Act 278, Louisiana Statutes of 1958 (LSA–RS 9:5806B) (Cum. Supp.)) does not, we submit, support the "classification" of the United States under Act 315. While the State may be entitled to "discriminate" against itself in legislating with respect to its own agencies, that should not mean that it has the right to discriminate in applying the legislation to others.

all manner of crippling restrictions on federal projects might result, and at all events the wide disparity in local law would create serious practical problems.

As discussed above, the United States, "exercising its constitutional functions," acquired the lands in question in accordance with federal statutes empowering it to do so; hence "[t]he validity and construction of [its] contracts"—in this case the conveyances containing the reservations—and "their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County, supra,* 322 U.S. at 183; see also *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 289; *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 366. The decision that state law controls in this case is contrary to these well-settled principles.

This is especially so as regards lands which the United States acquired by condemnation. "Condemnation involves essential governmental functions. * * * [W]here essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make State laws applicable * * *." *United States* v. *93.970 Acres,* 360 U.S. 328, 332–333. Similarly, the estates and interests created by declarations of taking are to be determined by federal law. See, *e.g., United States* v. *Pinson,* 331 F. 2d 759 (C.A. 5); *Bumpus* v. *United States,* 325 F. 2d 264 (C.A. 10); *United States* v. *Certain Interests in Property, etc.,* 271 F. 2d 379 (C.A. 7). Since Congress has not made

state law applicable here, there is no basis for depending on state law to define, or for permitting the state to change, the government's interests here.[9]

3. The decision below will affect a wide range of interests (including very valuable mineral interests) in federally-owned lands. The mineral rights underlying 12,625 acres of land are involved in this litigation alone. Mineral leases have been granted by the government on these lands. While no minerals have yet been produced, presumably there are indications of valuable mineral deposits.

But the significance of the case does not end with the land in issue here. The United States has acquired approximately 1,000,000 acres of land in Louisiana. At present, 560 mineral (chiefly oil and gas) leases have been issued covering 330,261 acres of such land. The government's interest under these leases is worth many millions of dollars. Although there are no readily available records indicating precisely the extent to which mineral reservations similar to the ones here were used in acquiring these lands, federal

---

[9] The courts below, apparently on the authority of the Fifth Circuit's *Leiter* opinion, characterized the mineral reservations in the conveyances as providing for a contractual prescription, rather than establishing a mineral servitude for a specified time (App. A, *infra*, p. 6a; App. B, *infra*, p. 17a). Act 315 thus applied under the Louisiana Supreme Court's interpretation of it, extending indefinitely the reservations by making them "imprescriptible." We submit that this construction of the reservations, whether federal or state law applies, is incorrect as shown by the federal district court's opinion in *Leiter* (see 204 F. Supp. at 565–567). While we do not contend that this issue is sufficiently important independently to warrant certiorari, we have included it in the questions presented in order to bring the case before this Court in its full legal context.

officials advise that such reservations were frequently employed. The mineral rights of the United States in all lands acquired with such reservations may be adversely affected by the decision below.

Moreover, the effect of the decision is not confined to Louisiana or to mineral rights. The United States has acquired approximately 2,078,000 acres of land under the Migratory Bird Conservation Act, situated in all but four States. Many additional millions of acres have been acquired in all of the States for national forests under the Weeks Law (Act of March 1, 1911, 36 Stat. 961), which closely parallels the Migratory Bird Conservation Act. The ruling that interests acquired by the federal government are to be measured in accordance with the vagaries of local property laws and are to be subject to revision by the States may adversely affect the title of the United States to many of such lands.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
KENT FRIZZELL,
Assistant Attorney General.
WM. TERRY BRAY,
Assistant to the Solicitor General.
EDMUND B. CLARK,
PETER R. STEENLAND,
Attorneys.

MAY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

APPENDIX A

In the United States District Court for the Western District of Louisiana, Lake Charles Division

Civil Action No. 14,588

UNITED STATES OF AMERICA

vs.

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL

Civil Action No. 14,589

UNITED STATES OF AMERICA

vs.

MISERE OIL & GAS COMPANY, INC., ET AL

HUNTER, Judge: Pursuant to Rule 42(a), Federal Rules of Civil Procedure, these actions, brought by the United States to quiet title to real property in Cameron Parish, in the State of Louisiana, were consolidated. Title to the property, described in detail in the complaints, was acquired by the United States in one instance (Civil Action No. 14589) by purchase on July 23, 1937, and in the other (Civil Action No. 14588) by condemnation action and judgment entered August 30, 1939. The acquisitions were for the purpose of creating a migratory bird sanctuary in accordance with the provisions of the Migratory Bird Treaty, 39 Stat. 1702 (1916), the Migratory Bird Treaty Act, 40 Stat. 755 (1918), 16 U.S.C.A. § 703, and the Migratory Bird Conservation Act, 45 Stat. 1222 (1929), 16

464-719—72——4

U.S.C.A. § 715(a) through (e); and Articles 2626 through 2641, inclusive, Civil Code of Louisiana and 28 La. Stat. Ann. Rev. Stat. Title 52. The lands involved form a part of the Lacassine Wildlife Refuge.

The land was acquired subject to reservations of oil, gas, sulphur or other minerals. The judgment of condemnation contained the following reservation of minerals and mineral rights in favor of the owners of the property:

> Reserving unto the grantor, its successors, legal representatives and assigns, and specifically excepting from this acquisition, all the oil, gas, sulphur and other minerals in, on or under said land, together with the right of investigating, exploring, prospecting, drilling and mining for and producing said oil, gas, sulphur and other minerals, laying pipelines, building tanks, power stations, telephone lines and other structures, thereon to produce, save, take care of, treat, store, transport and manufacture said minerals and housing the employees necessary for said purposes; which rights shall remain in force for a term of ten (10) years from the date of vesting of title in the United States and as long thereafter as oil, gas, sulphur or other mineral is produced from said land, or so long thereafter as grantor shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced.
>
> Provided further that at the end of said ten-year period of reservation, if not extended as hereinabove provided, or at the termination of any extended period in case the operation has not been carried on after said ten-year period as hereinabove provided, the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate at the end of said ten

> years, and the complete fee title to said lands shall thereby become vested in the United States.[1]

No drilling, reworking or other operations were conducted and no production of minerals of any kind was obtained from the lands described in Civil No. 14589 for a period of more than ten (10) years from and after July 23, 1937, and no drilling, reworking or other operations were conducted and no production of minerals of any kind was obtained from the lands described in Civil No. 14588 for a period of more than ten (10) years from and after August 30, 1939.

Defendants' interests in the oil, gas, sulphur and other minerals terminated by the terms of the reservations respectively no later than July 23, 1947, and August 30, 1949, unless Act 315 of 1940 (LSA–R.S. 9:5806(a)) has caused the reservations of the servitudes in favor of defendants to be imprescribtible.

The Act provides:

> * * * When land is acquired by conventional deed or contract, condemnation or expropriation proceeding by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other mineral or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescribtible.

---

[1] The act of sale contains a mineral reservation worded exactly as the above quoted reservation except for a few words not pertinent to the outcome of this case.

THE FACTS

The pertinent facts have been stipulated and the stipulation is attached to the original of this opinion.

CONTENTION OF THE PARTIES

The plaintiff contends that the mineral rights reserved to the former owners in the deed to the United States and to the condemnees in the condemnation proceeding expired by force of their own terms and were not affected by the operation of Act 315 of 1940 (LSA–R.S. 9:5806(a)). They argue that the terms of the reservations are explicit and create servitudes that are definite in their provisions and not subject to the imprescriptible provision of Act 315 of 1940. The Government insists also that if Act 315 of 1940 is interpreted as extending the grantors' or condemnees' servitude in the minerals, it is unconstitutional (1) as impairing the obligation of contract; (2) as derogating the supreme power of the Federal Government to acquire a precise estate by condemnation or purchase; and (3) as hostile and discriminatory against the United States in the acquisition of interests in the land.

On the other hand, defendants contend that *Leiter Minerals, Inc.* v. *United States* (5th Cir., 1964), 329 F. 2d 85, judgment vacated sub nom. *United States* v. *Leiter Minerals, Inc.,* 381 U.S. 413 (1965), as moot, is dispositive of the issues involved in this litigation.

HISTORY OF LEITER MINERALS, INC.

The case for declaratory judgment was brought in Plaquemines Parish by the claimant to the mineral servitude against the lessee of the United States for an interpretation of Act 315 of 1940 as it applied to deeds

to the United States in which a mineral servitude was reserved. The Louisiana District Court held that Act 315 of 1940 was applicable to all prescriptions, both statutory and contractual, and held for the plaintiff. Appeal was taken from that judgment to the Supreme Court of Louisiana and assigned to the Court of Appeals of Louisiana, Fourth Circuit, since the Supreme Court did not have jurisdiction, *Leiter Minerals, Inc.* v. *California Company,* 239 La. 116, 118 So. 2d 124 (1960). The Court of Appeals reversed the District Court holding that the mineral reservation in the deed to the United States was of a specified contractual duration rather than a statutory prescriptive period. *Leiter Minerals, Inc.* v. *California Company,* 126 So. 2d 76 (1961). The Supreme Court of Louisiana granted certiorari and reversed and set aside the judgment and dismissed the plaintiff's suit. *Leiter Minerals, Inc.* v. *California Co.,* 241 La. 915, 132 So. 2d 845 (1961).

Thereafter, the United States, which had not been a party to the State Court litigation, resumed its suit to quiet title to minerals in the United States District Court for the Eastern District of Louisiana. *United States* v. *Leiter Minerals, Inc.,* 204 F. Supp. 560 (1962). The District Court held that the servitude created in the deed was not governed by the usual laws of prescription and Act 315 of 1940 did not apply. Plaintiff's motion for summary judgment was granted. This case was reversed in *Leiter Minerals, Inc.* v. *United States,* 329 F. 2d 85 (5th Cir., 1964), with Judge Gewin dissenting, stating that he agreed with the District Court. Upon petition, the Supreme Court granted certiorari and thereafter, on suggestion of counsel, vacated the judgment, remanded the case to the District Court with directions to dismiss the complaint as moot. *United States* v. *Leiter Minerals, Inc.,* 381 U.S. 413 (1965).

CONCLUSIONS

Clearly, the provisions of the reservations in the instant cases reveal that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitudes. We agree with the parties that the Fifth Circuit's 2–1 decision in *Leiter Minerals,* 329 F. 2d 85, is dispositive of the issues involved in this litigation, unless the vacating of that decision by the Supreme Court, 381 U.S. 413, frees this Court to decide the Louisiana law and the federal constitutional issues as it, this Court, feels they should be decided. The main thrust of the Government's argument is that we are to decide all issues "de novo."

The procedure of vacating the judgment and dismissing the complaint is commonly used "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *U.S.* v. *Munsingwear,* 340 U.S. 36. This means that the vacated judgment clears the path for future re-litigation of the issues between the parties and eliminates a judgment, review of which was prevented (in Leiter Minerals) as a result of compromise. The effect of the vacated judgment may or may not free the Fifth Circuit from its 2–1 decision. Nevertheless, this Court (the Western District of Louisiana) must give to that decision stare decisis effect. Comment, Disposition of Moot Cases by the United States Supreme Court, 22 U. Chi. L. Rev. 77, 93 (1955); *Granville-Smith* v. *Granville-Smith,* 214 F. 2d 820 (3rd Cir., 1954); *U.S.* v. *Wolfe,* 232 F. Supp. 85 (1964). Any decision by this Court which would be contrary to the Fifth Circuit decision in *Leiter Minerals* would, in my judgment, be an unwarranted attempt to usurp the authority of the appellate court. Our conclusion is that we are obligated to

follow Leiter Minerals. The dismissal of that case by the Supreme Court as moot does not constitute a cogent reason to alter that obligation.

Judgment for defendants. Proper decree should be presented.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this the 8th day of March, 1971.

United States District Judge.

United States District Court, Western District of Louisiana, Lake Charles Division

Civil Action No. 14588

UNITED STATES, PLAINTIFF,

v.

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL., DEFENDANTS

Civil Action No. 14589 (Consolidated)

UNITED STATES, PLAINTIFF,

v.

MISERE OIL & GAS COMPANY, INC., ET AL., DEFENDANTS

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the attorneys for the parties to the above-entitled actions that the following facts are true and that no additional evidence will be required to establish such facts:

1. These actions were brought by the United States on April 25, 1969, to quiet title to the minerals and mineral rights in approximately 12,625 acres of land in Cameron Parish, Louisiana, which were acquired

by the United States by purchase or in condemnation proceedings in 1937 and 1939. The lands involved in these cases form a part of the Lacassine Wild Life Refuge under the jurisdiction of the Department of the Interior.

2. The jurisdiction of this Court in these cases is predicated upon 28 U.S.C. sec. 1345.

3. By order entered August 20, 1969, these actions were consolidated for trial pursuant to Rule 42(a) F.R.Civ.P.

CIVIL ACTION NO. 14588

4. The defendants, Little Lake Misere Land Company, Inc., and North American Land Company, Inc., are corporations duly organized and existing under the laws of the State of Louisiana with their principal place of business at Lake Charles in the Parish of Calcasieu, Louisiana.

5. The property described in paragraph 4 of plaintiff's complaint was acquired by the United States through a judgment of condemnation rendered in certain proceedings entitled *United States* v. *2574.18 acres of land in Cameron Parish, Louisiana, Little Lake Misere Land Company, Inc., Tax Collector of Cameron Parish, North American Land Company, Inc., Bell City Drainage District of Cameron and Calcasieu Parishes,* Civil Action File No. 4, in the United States District Court for the Western District of Louisiana, Lake Charles Division, dated January 25, 1939. The judgment of January 25, 1939, is recorded in Conveyance Book 41, page 49, under Entry No. 37771 of the Records of Cameron Parish, Louisiana, the judgment in condemnation having become final and effective through a final judgment rendered by the same court on August 30, 1939, and recorded in Conveyance Book 43, page 13, under Entry No. 41013 of the Records of Cameron Parish. Certified copies of the two

judgments are annexed hereto and made a part hereof as Exhibits 1 and 2.

6. The lands acquired by the United States in the condemnation proceedings referred to in the preceding paragraph are shown in blue on the attached map marked Exhibit "A" which is made a part hereof.

7. The judgment of condemnation in Civil Action No. 4, referred to above, contains the following reservation of minerals and mineral rights in favor of the prior owners of the property who were defendants in the condemnation proceedings:

> "Reserving unto the grantor, its successors, legal representatives and assigns, and specifically excepting from this acquisition, all the oil, gas, sulphur and other minerals in, on or under said land, together with the right of investigating, exploring, prospecting, drilling and mining for and producing said oil, gas, sulphur and other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures, thereon to produce, save, take care of, treat, store, transport and manufacture said minerals and housing the employees necessary for said purposes; which rights shall remain in force for a term of ten (10) years from the date of vesting of title in the United States and as long thereafter as oil, gas, sulphur or other mineral is produced from said land, or so long thereafter as grantor shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced.
>
> "Provided further that at the end of said ten-year period of reservation, if not extended as hereinabove provided, or at the termination of any extended period in case the operation has not been carried on after said ten-year period as hereinabove provided, the right to mine, produce and market said oil, gas, sulphur or

other mineral shall terminate at the end of said ten years, and the complete fee title to said lands shall thereby become vested in the United States.

"Provided that forty per cent, (40%) of one-eighth (1/8) royalty of all oil, gas, sulphur and other minerals so removed shall be paid to the United States of America until the total royalties so paid to the United States shall equal the purchase price of $12,870.90."

8. No drilling, reworking or other operations were conducted and no production of minerals of any kind was obtained from the lands described in Paragraph 4 of plaintiff's complaint for a period of more than ten (10) years from and after January 25, 1939, and for a period of more than ten (10) years from and after August 30, 1939.

9. By deed dated November 15, 1966, recorded in File No. 112896 in Conveyance Book 230 of the Records of Cameron Parish, the defendant Little Lake Misere Land Company, Inc., conveyed to its shareholders, all of whom have been made defendants in this action, 90% of all of the royalties payable under oil, gas and mineral leases then or thereafter affecting the lands owned by that company prior to the judgment of condemnation rendered January 25, 1939, in Civil Action No. 4.

10. The plaintiff and the defendants have continued to claim the minerals and mineral rights in the property described in Paragraph 4 of the complaint subsequent to 1949. The United States acting through the Bureau of Land Management, Department of the Interior, issued oil and gas leases on December 1, 1955, covering the lands described in Paragraph 4 of the complaint. The defendants have also executed various contracts to other persons covering the same lands in which the defendants claim the mineral and mineral rights in the lands.

CIVIL ACTION NO. 14589

11. The defendant Misere Oil & Gas Company, Inc., is a corporation duly organized and existing under the laws of the State of Louisiana, having its principal place of business in Lake Charles in the Parish of Calcasieu, Louisiana.

12. The property described in Paragraph 3 of the plaintiff's complaint, consisting of 10,048.01 acres of land in Cameron Parish, Louisiana, was acquired by the United States by an act of sale (deed) dated July 23, 1937, from Misere Land Company, Inc., a Louisiana corporation, as vendor, to the United States of America, as vendee, recorded in Conveyance Book 34, page 60, in File No. 36321 of the Records of Cameron Parish, Louisiana. The act of sale (deed) contains the following mineral reservation in favor of the vendor:

> "Reserving unto vendor, its successors, legal representatives and assigns, and specifically excepting from this sale all the oil, gas, sulphur and other minerals in, on or under said land, together with the right of investigating, exploring, prospecting, drilling and mining for and producing said oil, gas, sulphur and other minerals, laying pipe lines, building tanks, roads and canals, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, store, transport and manufacture said minerals, and housing the employees necessary for said purposes, which rights shall remain in force for a term of ten years from the date of the deed conveying said land and as long thereafter as oil, gas, sulphur or other mineral is produced from said land, or so long thereafter as vendor shall conduct drilling or reworking operations thereon with no cessation of more than sixty consecutive days until production results, and if production results, so long as such mineral is produced.

"Provided further that at the end of said ten-year period of reservation, if not extended as hereinabove provided, or at the termination of any extended period in case the operation has not been carried on after said ten-year period, as hereinabove provided, the right to mine, produce and market said oil, gas, sulphur and other minerals shall terminate at the end of said ten years, and the complete fee title to said land shall thereby become vested in the United States.

"Provided that forty per cent (40%) of one-eighth (1/8) royalty of all oil, gas, sulphur and other minerals so removed shall be paid to the United States of America until the total royalties so paid to the United States shall equal the purchase price of $40,192.04."

Certified copy of said act of sale is annexed hereto as Exhibit 3.

13. The lands acquired by the United States by the act of sale (deed) of July 23, 1937, referred to in the previous paragraph, are shown in red on the attached map which is made a part hereof as Exhibit "A."

14. No drilling, reworking or other operations were conducted and no production of minerals of any kind was obtained from the lands described in Paragraph 3 of plaintiff's complaint for a period of more than ten (10) years from and after July 23, 1937.

15. Misere Land Company, Inc., vendor in the deed to the United States of July 23, 1937, was completely and finally liquidated, and Alvin O. King, the duly elected and qualified Liquidator of said corporation, by deed dated December 27, 1943, conveyed to the shareholders of Misere Land Company, Inc., as a liquidating dividend, the minerals and mineral rights reserved by Misere Land Company, Inc., in the act of sale to the United States of July 23, 1937.

16. By various acts dated various dates in 1967, all parties who acquired from the Liquidator of Misere

Land Company, Inc., the mineral rights reserved by Misere Land Company, Inc., in the act of sale to the United States of July 23, 1937 (or the successors of those parties who had then died) conveyed such minerals and mineral rights to Misere Oil & Gas Company, Inc., defendant in this action.

17. By deed dated March 28, 1968, recorded in File No. 114405 of the Records of Cameron Parish, Misere Oil & Gas Company, Inc., conveyed to the remaining parties named as defendants in this action 90% of all the royalties payable under oil, gas and mineral leases then affecting the lands described in Paragraph 3 of plaintiff's complaint, or royalties reserved in any lease thereafter executed affecting said lands.

18. The whole of the land described in Paragraph 3 of plaintiff's complaint was acquired by Misere Land Company, Inc., from the Smith Land & Lumber Company, Inc., February 26, 1929, for $46,000.00, $11,500.00 of which was paid in cash and the balance in four promissory notes, each for $8,625.00 due at the end of successive yearly periods. The land was sold by Misere Land Company, Inc., to the United States on July 23, 1937, for $40,192.04 cash, subject to the reservation of mineral rights set forth in Paragraph 12 of this stipulation.

19. The plaintiff and the defendants have continued to claim the minerals and mineral rights in the property described in Paragraph 3 of the plaintiff's complaint subsequent to 1947. The United States acting through the Bureau of Land Management, Department of the Interior, issued oil and gas leases on December 1, 1955, covering the lands described in Paragraph 3 of the complaint. The defendants have also executed various contracts to other persons covering the same lands in which the defendants claim the mineral and mineral rights in the lands.

IN TESTIMONY WHEREOF, this stipulation is executed this 6th day of May, 1970.

DONALD E. WALTER,
United States Attorney for the Western District of Louisiana,
DOSITE H. PERKINS, Jr.,
Assistant United States Attorney,
Attorneys for Plaintiff.

AUSTIN W. LEWIS.
Attorney for Defendants.

APPENDIX B

In the
United States Court of Appeals
for the Fifth Circuit

No. 71-2425
Summary Calendar*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Western District of Louisiana

(December 30, 1971)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The United States filed suit to quiet title to various properties owned by the United States subject to mineral reservations in favor of the various parties defendant. Title to the properties was acquired by the United States in one instance by purchase on July 23, 1937, and in the other instance by judgment in condemnation proceedings on August 30, 1939. Both acquisitions were for the purpose of creating a part of the Lacassine Wildlife Refuge, a bird sanctuary in Cameron Parish, pursuant to the Migratory Bird

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409.

Treaty, 16 U.S.C. § 703, and the Migratory Bird Conservation Act, 16 U.S.C. § 715(a) et seq. In each case the United States reserved to the landowners from whom the properties were acquired, certain mineral interests for a term of 10 years and as long thereafter as production or drilling continued. The pertinent reservation contained in the written act of sale is set out in the margin.[1] The mineral reservation contained in the judgment of condemnation is substantially the same as that contained in the act of sale. It was stipulated that there had been no drilling on the properties within 10 years from the date of creation of the mineral reservations. The only issue is whether the reservations created imprescriptible mineral servitudes

[1] "Reserving unto the grantor, its successors, legal representatives and assigns, and specifically excepting from this acquisition all the oil, gas, sulphur and other minerals in, on or under said land, together with the right of investigating, exploring, prospecting, drilling and mining for and producing said oil, gas, sulphur and other minerals, laying pipe lines, building tanks, power stations, telephone lines and other structures, thereon to produce, save, take care of, treat, store, transport and manufacture said minerals and housing the employees necessary for said purposes; which rights shall remain in force for a term of ten (10) years from the date of vesting of title in the United States and as long thereafter as oil, gas, sulphur or other mineral is produced from said land, or so long thereafter as grantor shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced.

"Provided further that at the end of said ten-year period of reservation, if not extended as hereinabove provided, or at the termination of any extended period in case the operation has not been carried on after said ten-year period as hereinabove provided, the right to mine, produce and market said oil, gas, sulphur or other minerals shall terminate at the end of said ten years, and the complete fee title to said lands shall thereby become vested in the United States."

within the meaning of Act 315 of 1940 of the Louisiana Legislature, La. R. S. 9:5806(A), or whether they were extinguished by 10 years of nonuser.[2]

The District Court held that "[c]learly, the provisions of the reservations in the instant cases reveal that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitudes." Thus, under Act 315 the mineral reservations were imprescriptible. The District Court considered himself bound by our former opinion in the case of *Leiter Minerals, Inc.* v. *United States,* 5 Cir. 1964, 329 F. 2d 85, vacated as moot, sub nom., *United States* v. *Leiter Minerals Inc.,* 381 U.S. 413, 85 S. Ct. 1575 (1965). The United States argues that *Leiter* is of no precedential value because of the Supreme Court's dismissal as moot. The Government argues that Leiter was incorrectly decided by us and should now be reversed. We disagree and affirm the judgment of the lower court on the basis of the principles enunciated by Judge Rives for the Court in *Leiter.*

Finally, the Government contends that if Act 315 is interpreted so as to "extend" the grantors' or con-

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[2] Act 315 of 1940 provides:

"Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

"Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed."

demnees' servitude in the minerals, it would be unconstitutional as impairing the obligations of contract; as derogating the supreme power of the Federal Government to acquire a precise estate by condemnation or purchase; and as hostile and discriminatory against the United States in the acquisition of an interest in land. The first and second points have been rejected by us in *United States* v. *Nebo Oil Co.*, 5 Cir., 1951, 190 F. 2d 1003. The principles enunciated in *Nebo* were reaffirmed by Judge Rives in *Leiter*, 329 F. 2d at 94. As to the contention that Louisiana's Act 315 is hostile to the United States, we note that the same principle applies to acquisitions by the State of Louisiana, La. R. S. 9:5806(B), and that the act really does nothing more than place citizens of Louisiana in the same position as citizens of other states whose land has been purchased or condemned by the United States. We hold, therefore, that Act 315 is not unconstitutional. See *United States* v. *Fox*, 94 U.S. 315, 24 L. Ed. 192 (1877); *United States* v. *Burnison*, 339 U.S. 87, 70 S. Ct. 503 (1950). Cf. *United States* v. *1,078.27 Acres of Land, etc.*, 5 Cir., 1971, —— F.2d —— [No. 29912, July 6].

AFFIRMED.

APPENDIX C

United States Court of Appeals for the Fifth Circuit

October Term, 1971

No. 71-2425
Summary Calendar

D.C. Docket No. CA 14,588 & 14,589

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

LITTLE LAKE MISERE LAND COMPANY, INC., ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Western District of Louisiana

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: January 21, 1972.

DECEMBER 30, 1971.

APPENDIX D

United States Court of Appeals, Fifth Circuit

March 3, 1964

No. 19963

THE LEITER MINERALS, INC., APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

RIVES, Circuit Judge.

The question presented is the right to mine and remove oil, gas, and other minerals from about 8711 acres of land in Plaquemines Parish, Louisiana, a right worth many millions of dollars. The mineral right was established in a deed dated December 21, 1938 from Thomas Leiter conveying the lands to the United States, and reserving the right to the minerals as follows:

> "The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals

so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000 being the purchase price paid by said United States of America for the aforedescribed properties.

"Provided, that if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945.

"Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

"Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land becomes vested in the United States.

"The reservation of the oil and mineral rights herein made for the original period of ten (10) years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above above (sic) set forth, remain vested in the vendors."

The appellant, Leiter Minerals, Inc., hereafter Leiter, is the successor in interest to the right reserved by Thomas Leiter, and bases its claim upon that reservation. It concedes that no minerals have ever been produced by either Thomas Leiter or any successor in interest to the right established by that reservation. The United States issued four oil and gas leases to Frank J. Lobrano and Allen Lobrano, who entered into operating agreements with The California Company, hereafter California. California completed the first producing well in January 1950. By May of 1954, 80 wells were producing, under which the royalty paid to the United States had then exceeded $3,500,000.00.

Under the terms of the reservation, it would be clear that the right to mine terminated and complete fee in the land became vested in the United States but for the possible operation on the mineral right of two Louisiana statutes. Act No. 151 of 1938, in existence at the date of the deed, provided:

> "* * * That when real estate is acquired by the United States of America, the State of Louisiana, or any of its subdivisions, from any person, firm or corporation for use in any public work and/or improvement, and, by the act of acquisition, oil, gas and/or other minerals or royalties are reserved, prescription shall not run against such reservation of said oil, gas and/or other minerals or royalties."

That Act was repealed by Act 315 of 1940, LSA-R.S. 9:5806, which provides:

> "* * * That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are

> reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

The ownership of the mineral right depends upon whether the mineral reservation provided for a contractual prescription for the conditional extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes.

The first suit was filed in a Louisiana state court on August 13, 1953 by Leiter, against California and Allen L. Lobrano. The United States then filed in the federal district court the present action to quiet title, asserting its right to the minerals. The district court granted a preliminary injunction enjoining Leiter from prosecuting the state court action.[1] This Court affirmed.[2] On certiorari, the Supreme Court modified the judgment of this Court to permit an interpretation of the Louisiana statute involved to be sought with every expedition in the Louisiana courts, saying:

> "The Government contends that Act No. 315 of 1940 does not apply when the parties themselves have contracted for a reservation of specific duration and that if the statute is construed to apply to this situation, it would impair the obligation of the Government's contract. Petitioner disagrees. The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District

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[1] Opinion reported as *United States* v. *Leiter Minerals, Inc.*, E.D.La. 1954, 127 F. Supp. 439.

[2] *Leiter Minerals, Inc.* v. *United States*, 5 Cir. 1955, 224 F. 2d 381.

> Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, La.Rev. Stat., 1950, 13:4231 et seq., and the United States of course may appear to urge its interpretation of the statute. See *Stanley* v. *Schwalby*, 147 U.S. 508, 512–513 [13 S.Ct. 418, 37 L.Ed. 259]. It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.
>
> "We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion."

Leiter Minerals, Inc. v. *United States*, 1957, 352 U.S. 220, 229, 230, 77 S.Ct. 287, 292, 293, 1 L.Ed.2d 267. The Louisiana court rendered three published opinions, the last of which is presently of most importance.[3] The Supreme Court of Louisiana summarized its advice to the federal courts as follows:

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[3] *Leiter Minerals, Inc.* v. *California Co.*, 1960, 239 La. 116, 118 So.2d 124; *Leiter Minerals, Inc.* v. *California Co.*, Ct.App. La. 4th Cir., 1961, 126 So.2d 76; *Leiter Minerals, Inc.* v. *California Co., La.* 1961, 241 La. 915, 132 So.2d 845.

> "To summarize in conclusion, it is our view, and we hold: First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for a definite, fixed, and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as not establishing a servitude for a fixed, definite and certain time, and if it is decided that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act 315 of 1940 is applicable and constitutional. The interpretation of the contract is for the United States courts."

Leiter Minerals, Inc. v. *California Co.,* La. 1961, 241 La. 915, 132 So.2d 845, 854, 855.

The federal district court then granted summary judgment in favor of the United States.[4] This appeal is from that judgment.

The United States argues that the deed is explicit that under the admitted circumstances the right was "to expire" and "the right to mine shall terminate, and complete fee in the land become vested in the United States"; that such a contract is valid under federal law; and that the rights of the United States under the deed are governed by federal law, citing *Clearfield Trust Co.* v. *United States,* 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; *United States* v. *Allegheny County,* 1944, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209; *Ivanhoe Irr. Dist.* v. *McCracken,* 1958, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313; *Girard Trust Co.* v. *United States,* 3 Cir. 1945, 149 F.2d 872, 874; *Whitin Machine Works* v. *United States,* 1 Cir.

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[4] *United States* v. *Leiter Minerals, Inc.*, E.D.La. 1962, 204 F.Supp. 560.

1949, 175 F.2d 504, 507; *United States* v. *Jones,* 9 Cir. 1949, 176 F. 2d 278, 281.

The land was acquired by the United States in order to establish the "Delta Migratory Waterfowl Refuge," pursuant to the authority of the Migratory Bird Conservation Act, 16 U.S.C.A. § 703 et seq. Sections 715d and 715e authorize the Secretary of the Interior (1) to purchase or rent appropriate areas for migratory bird sanctuaries; (2) to do all things necessary to make such acquisitions; and provide, (3) that no such acquisitions by the United States shall "be defeated because of rights-of-way, easements, and reservations which * * * will in the opinion of the Secretary * * * in no manner interfere with the use of the areas so encumbered"; and (4) that such rights-of-way, easements, and reservations shall be subject to such regulations as the Secretary shall prescribe, and "it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease," or if deemed necessary by the Secretary to such rules and regulations as may be prescribed by him.

In addition, section 715f of the Migratory Act reads:

> "No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title *unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.*" (Emphasis added.)

We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized

the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable. *United States* v. *Certain Property, etc.*, 2 Cir. 1962, 306 F.2d 439, 444, 445.

In effect, that is the teaching of the rules of decision act.[5] While this is not a diversity case controlled by the Erie doctrine (*Erie R. Co.* v. *Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188), the rules of decision act always has had "application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character." *Swift* v. *Tyson*, 1842, 41 U.S. (16 Pet.) 1, 18, 10 L.Ed. 865. As to such matters, in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available. In the classical language of Mr. Justice Cardozo, speaking for the Supreme Court in *Hawks* v. *Hamill*, 1933, 288 U.S. 52, 59, 60, 53 S.Ct. 240, 242, 77 L.Ed. 610:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C.A. § 1652.

> "At least it is a considered dictum, and not comment merely *obiter*. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement. * * * In controversies so purely local, little gain is to

[5] "§ 1652. *State laws as rules of decision*

> be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot."

On "* * * questions of state law that are not subject to overriding federal law * * *" (352 U.S. 230, 77 S. Ct. 293, 1 L. Ed. 2d 267), the opinions of the Louisiana state courts, rendered in response to the suggestion of the Supreme Court (352 U.S. 229, 230, 77 S. Ct. 287, 1 L. Ed. 2d 267) are all highly instructive, and the opinion of the State Supreme Court is controlling.

The State district court, Judge Bruce Nunez, entered judgment in favor of Leiter pursuant to an opinion which was adopted by Supreme Court Justice Hamlin as his dissent and is published in 132 So. 2d at pp. 856–860. In part, Judge Nunez said:

> " 'In 1938, when Leiter sold to the government and reserved the mineral rights, the government had no assurance that the mineral rights would not be forever preserved to the vendor. The government's right to become thereafter vested with the ownership of the minerals, depended entirely on the uncertain future. The contract contained specific provisions which would have permitted Leiter to maintain his mineral rights forever, or at least indefinitely. It is this Court's considered opinion that what the parties did in 1938 was to establish, in a mode not prohibited by law or public policy, a conventional or contractual prescription as to the mineral rights and when the Legislature passed Act 315 a year and a half later, those mineral rights were still in effect. Likewise, at the time the Legislature passed the 1940 Act the government's rights to the minerals

> were just as contingent and uncertain as they were when Leiter executed the deed in 1938." (132 So.2d at p. 859.)

The State Court of Appeals took a diametrically opposite view, and "declared and decreed that Act 315 of 1940 (LSA–R.S. 9:5806) does not apply in this case since the mineral reservation is of specific ex contractu duration, less than the prevailing statutory period of ten years for non-user." (126 So.2d at 82.)

Mr. Justice Hawthorne, speaking for the majority of the Supreme Court of Louisiana, thought that both the Louisiana district court and the Louisiana Court of Appeals went too far, and that they should have confined their opinions to an interpretation of the Louisiana statute:

> "As we view the matter, both the Louisiana district court and the Louisiana Court of Appeal went far beyond the directive of the United States Supreme Court, as our state courts were not asked to interpret or construe the reservation of the mineral rights in the deed to the United States." (132 So. 2d at p. 850.)

It nonetheless seems clear that the majority of the Supreme Court of Louisiana held the opinion that when the entire reservation was read together and in context, Leiter's servitude was one of indefinite duration. It disagreed flatly with the opinion of the Louisiana Court of Appeals and, continuing the paragraph of its opinion last quoted, said:

> "In this connection, however, we cannot help but observe that the Court of Appeal in reaching its conclusion did not consider the entire reservation but concentrated its whole attention on a single date in it. In this it was in error, for under Article 1955 of our Civil Code

> 'All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act'. For this reason the decision of the Court of Appeal on this point should not be given any weight." (132 So. 2d at p. 850.)

In another part of its opinion, the Supreme Court of Louisiana said:

> "An example of a servitude established for a certain time (a servitude of specific duration) is that created by the mineral reservation in the case of *Hodges* v. *Norton,* 200 La. 614, 8 So. 2d 618. Counsel for the government's lessees argue that the mineral reservation in that case is similar to the reservation in the Leiter deed. For what it may be worth, our opinion is that it is not." (132 So.2d at p. 851.)

We agree that, since the United States had the right to invoke federal jurisdiction (28 U.S.C.A. § 1345), the ultimate responsibility for the interpretation of the reservation rests upon the federal courts. That interpretation, however, must be in accordance with State law; and the opinions of the State courts, and especially of the State Supreme Court, are entitled to the most earnest and respectful consideration. While the State Supreme Court undertook to confine its opinion to the interpretation of the State statute, it was proper and inevitable that it do so "in light of" the reservation to which that statute might apply. See *England* v. *Louisiana State Board of Medical Examiners, et al.,* 1964, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440.

After careful consideration, we find ourselves in full agreement with the Supreme Court of Louisiana. The federal district court observed that: "'Contractual prescription', is at best an odd notion." (204 F. Supp. 567.) The notion, however, appears to us con-

sistent with the concept of a private law between the parties embodied in the provisions of the LSA-Civil Code that, "agreements legally entered into have the effect of laws on those who have formed them," Article 1901; and again, "legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them," Article 1945. That last expression is, of course, not intended to deny any power of the Louisiana Legislature to render an agreement inoperative, for in this case the Louisiana Supreme Court has advised as to Act 315 of 1940 that:

> "The act draws no distinction between statutory and contractual prescription, and, as we view the matter from the history of the act and the objects and purposes for which it was adopted, it is manifest that the Legislature intended the act to be applicable to prescription whether established by statute or by contract where prescription had not already accrued at the time the act became effective." (132 So. 2d at p. 854.)

The Louisiana Supreme Court cites as kinds of servitude which may not be affected by prescription, those which meet the tests of Article 821,[6] or of Article 783(6)[7] of the Civil Code of Louisiana (132 So. 2d at 852).

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[6] "Art. 821. Servitudes are also extinguished when they have been established for a certain time only, or under a condition that in a certain event they shall cease; for when the time expires, or the event takes place, the servitude becomes extinguished of right." 3 LSA-C.C. Title 4.

[7] "Art. 783. Servitudes are extinguished:

"* * *

"6. By the expiration of the time for which the servitude was granted, or by the happening of the dissolving condition attached to the servitude." 3 LSA-C.C. Title 4.

Whether the parties stipulated for a period of contractual prescription must be determined from their viewpoint as of the time they entered into the contract. That is shown by the words "have been established" in Civil Code Article 821, note 6, supra, and is recognized in the Louisiana Supreme Court's summary of its holdings which we have quoted, and at other places in the opinion of the Louisiana Supreme Court, e.g.:

> "Where mineral rights in lands sold to the United States government are reserved for a certain, definite, and fixed time in the contract, or, in other words, where the servitude has been established for a certain or fixed time, at the expiration of the time fixed the servitude is lost or extinguished; and since in such a case there is no question of prescription, Act 315 of 1940 is without application." (132 So. 2d at p. 853.)

Under that language, it seems clear that "a certain time only" as used in Article 821 means "a certain definite and fixed time." Louisiana Civil Code, Articles 2048 and 2049 make it equally clear that "certain event" means an event which in the course of nature is certain to occur.

> "Art. 2048. The time given or limited for the performance of an obligation, is called its *term.*"
>
> "Art. 2049. A term may not only consist of a determinate lapse of time, but also of an event, provided that event be in the course of nature, certain; if it be uncertain, it forms a condition."

The first paragraph of the reservation provided: "* * * the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945 * * *."

But for the words "subject to the conditions hereinafter set forth" the servitude would have been established "for a certain time only." The first condition was expressed in the next paragraph, as follows:

> "* * * if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945."

It seems to us inescapable that that condition made the period for which the servitude was established indefinite and uncertain. At the time the parties entered into the contract it could not be known whether that condition would be met. The event was not "in the course of nature, certain".[8]

Successive conditions, likewise indefinite and uncertain, are provided in the succeeding paragraph:

> "* * * said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period * * *."

At the time the servitude was established, it might extend, according to the contract, for 10 years, 15 years, 20 years or until the minerals were exhausted. The district court properly commented that "[t]he

[8] Art. 2049 of LSA-Civil Code.

Louisiana Supreme Court itself has told us that an 'uncertain and indefinite duration' is the hallmark of prescription," and continued, "Here the hallmark is missing." (204 F. Supp. at p. 567). We cannot agree, but think that here the hallmark is inescapably present.

The district court pointed out many ways in which the "periods of reservation" differed from statutory prescription:

> "* * * There are other essential differences between the effect of these provisions and the rules of liberative prescription. These may be summarized:
>
> "First, under the present contract, *a large area will be released* from the servitude after the expiration of ten years *regardless of use or production*, for only 25 acres around each well are saved in any event.
>
> "Second, no use of the servitude short of *actual production in paying quantities for at least fifty days a year for three years* will preserve any part of the servitude beyond the primary term.
>
> "Third, only production in the *last three years* of the primary term will renew the servitude.
>
> "Fourth, even the requisite production at the right time will renew the servitude for *only five additional years.*
>
> "These are not the characteristics of legal prescription, nor of any known contractual variant." (204 F. Supp. at pp. 566, 567.)

There would be no need to recognize contractual prescription if it had to conform to statutory prescription. Art. 1764 of the LSA-Civil Code provides, in part, that, "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts * * *." Thus, Louisiana provides for the utmost liberty to contract. We can see no reason why the contracting parties were not at liberty to pre-

scribe the type of user which will overcome the presumption of abandonment and to require that it be a successful user. See *Keebler* v. *Seubert,* 1929, 167 La. 901, 120 So. 591, 592. We conclude that the district court erred in holding that the reservation in the deed did not provide for a contractual prescription for the conditional extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes.

Appellees insist, however, that if the Louisiana statutes are so applied they would be unconstitutional because they would impair the obligations of the contract. Article I, Section 10 of the Constitution provides that, "No state shall * * * pass any * * * law impairing the obligation of contracts." The Constitution of Louisiana contains a similar provision, as to which the Supreme Court of Louisiana held: "Act 315 of 1940 does not violate Article 4, Section 15, of the Louisiana Constitution of 1921, which provides that vested rights shall not be divested and that no law impairing the obligation of contracts shall be passed." (132 So.2d at p. 854.) The reasoning upon which that holding was based seems to us sound and to apply with equal force to the like provision of the Constitution of the United States. The discussion, together with the full discussion of the constitutionality of Act 315 of 1940 contained in this Court's opinion in *United States* v. *Nebo Oil Co.,* 5 Cir. 1951, 190 F. 2d 1003, 1009, 1010, make it unnecessary further to labor the constitutional question.

That is even more clear when we consider that the contract may not have become legally binding until it was ratified and adopted by Thomas Leiter on October 24, 1938, after Act No. 151 of 1938 had been passed. Theretofore the contract of March 14, 1935 had been executed only by the executors and trustees under the will of Joseph Leiter without any

court authority, and though a space was provided for the execution of the agreement on behalf of the United States by the Secretary of Agriculture, it had never been so executed. Thomas Leiter's ratification recites that, "* * * on June 27, 1935, the United States of America mailed a notice of acceptance 'of the aforesaid offer to Mr. C. J. Tessier, 217 Carondelet Street, New Orleans, Louisiana, accepting the option above described on the terms and provisions stipulated therein' * * *." Mr. Tessier's authority or connection with the title does not otherwise appear from the record. It does appear, however, that on October 18, 1935 the Executors and Trustees under the will of Joseph Leiter executed a grant of preliminary use and occupation "in order that the United States may immediately establish the Delta Migratory Waterfowl Refuge by Executive Order." Under that permission, the United States entered into possession in 1936 and surveyed and mapped the area during the Winter of 1936–1937.

It is thus doubtful whether the contract became legally binding prior to the passage of Act No. 151 of 1938. Upon the assumption, however, that it became binding on its date, March 14, 1935, we hold there is no constitutional obstacle to the application of the Louisiana statutes—Act No. 151 of 1938 or Act No. 315 of 1940.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

GEWIN, Circuit Judge (dissenting).

After carefully considering the brilliant, clear and well-written opinion of the majority, I find myself more in agreement with the opinion of the District

Court [1] than with the majority opinion. Accordingly, I would adhere to the result and the conclusions reached by the District Court.

It appears to me that the majority opinion is not correct in holding that the mineral reservation provided for a contractual prescription for the *conditional* extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes, which is to say, that there were conditions or a condition set forth in the contract which made the period for which the servitude was established indefinite and uncertain. The reservation was not of indefinite duration in my view, but was for a definite, fixed and specified time which elapsed on December 21, 1948,[2] before the Government executed its lease and before the discovery of oil.

The contract did not provide for a *conditional extinguishment,* but actually provided for a *conditional partial renewal.* The renewal conditions were not met during the initial 10 year period, and only the occurrence of those uncertain conditions would have renewed or extended the definite, fixed initial period of 10 years. The term of the servitude is definite. The right of renewal or extension is conditional and indefinite. In addition to the foregoing, as clearly pointed out by the District Court and noticed by the majority, a large area of the property would be released from the servitude inevitably, regardless of what took place.

I would affirm the judgment of the District Court.

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[1] *United States* v. *Leiter Minerals, Inc.* (D.C.E.D. La. 1962) 204 F. Supp. 560.

[2] See note 26 of the District Court's opinion reported in 204 F. Supp. 560.

APPENDIX E

Additional Statutes Involved

Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 16 U.S.C. (1964 ed.) 715, *et seq.*:

§ 715a. A commission to be known as the Migratory Bird Conservation Commission, consisting of the Secretary of the Interior, as chairman, the Secretary of Commerce, the Secretary of Agriculture and two Members of the Senate, to be selected by the President of the Senate, and two Members of the House of Representatives to be selected by the Speaker, is created and authorized to consider and pass upon any area of land, water, or land and water that may be recommended by the Secretary of the Interior for purchase or rental under sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title, and to fix the price or prices at which such area may be purchased or rented; and no purchase or rental shall be made of any such area until it has been duly approved for purchase or rental by said commission. * * *

§ 715c. The Secretary of the Interior shall recommend no area for purchase or rental under the terms of sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title except such as he shall determine is necessary for the conservation of migratory game birds.

§ 715d. The Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission, at the price or prices fixed by said commission, and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes, and to pay the

purchase or rental price and expenses incident to the location, examination, and survey of such areas and the acquisition of title thereto, including options when deemed necessary by the Secretary of the Interior from moneys to be appropriated hereunder by Congress from time to time * * *.

§ 715d–1. When the public interests will be benefited thereby the Secretary of the Interior is authorized, in his discretion, to accept on behalf of the United States title to any land which he deems chiefly valuable for wildlife refuges, and in exchange therefor to convey by deed on behalf of the United States an equal value of lands acquired by him for like purposes, or he may authorize the grantor to cut and remove from such lands an equal value of timber, hay, or other products, or to otherwise use said lands, when compatible with the protection of the wildlife thereon, the values in each case to be determined by said Secretary. Timber or other products so granted shall be cut and removed, and other uses exercised, under the laws and regulations applicable to such refuges and under the direction of the Secretary of the Interior and under such supervision and restrictions as he may prescribe. * * *

§ 715e. The Secretary of the Interior may do all things and make all expenditures necessary to secure the safe title in the United States to the areas which may be acquired under sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title, but no payment shall be made for any such areas until the title thereto shall be satisfactory to the Attorney General, but the acquisition of such areas by the United States shall in no case be defeated because of rights-of-way, easements, and reservations which from their nature will in the opinion of the Secretary of the Interior in no manner interfere with the use of the areas so encumbered for the purposes of said sections, but such rights-of-way,

easements, and reservations retained by the grantor or lessor from whom the United States receives title under said sections or any other Act for the acquisition by the Secretary of the Interior of areas for wildlife refuges shall be subject to rules and regulations prescribed by the Secretary of the Interior for the occupation, use, operation, protection, and administration of such areas as inviolate sanctuaries for migratory birds or as refuges for wildlife; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time.

§ 715f. No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

§ 715g. The jurisdiction of the State, both civil and criminal, over persons upon areas acquired under sections 715–715d, 715e, 715f–715k and 715*l*–715r of this title shall not be affected or changed by reason of their acquisition and administration by the United States as migratory-bird reservations, except so far as the punishment of offenses against the United States is concerned.

§ 715i. No person shall knowingly disturb, injure, or destroy any notice, signboard, fence, building, ditch, dam, dike embankment, flume, spillway, or other improvement or property of the United States on any area acquired under sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title, or cut, burn, or destroy any timber, grass, or other natural growth, on said

area or on any area of the United States which heretofore has been or which hereafter may be set apart or reserved for the use of the Department of the Interior as a game refuge or as a preserve or reservation and breeding ground for native birds, under any law, proclamation, or Executive order, or occupy or use any part thereof, or enter thereon for any purpose, except in accordance with regulations of the Secretary of the Interior * * *.

§ 715k. For the acquisition, including the location, examination, and survey, of suitable areas of land, water, or land and water, for use as migratory bird reservations, and necessary expenses incident thereto, and for the administration, maintenance, and development of such areas and other preserves, reservations, or breeding grounds frequented by migratory game birds and under the administration of the Secretary of the Interior, including the construction of dams, dikes, ditches, flumes, spillways, buildings, and other necessary improvements, and for the elimination of the loss of migratory birds from alkali poisoning, oil pollution of waters, or other causes, for cooperation with local authorities in wildlife conservation, for investigations and publications relating to North American birds, for personal services, printing, engraving, and issuance of circulars, posters, and other necessary matter and for the enforcement of the provisions of sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title, there are authorized to be appropriated * * *.

§ 715s. (1958 ed.) Twenty-five per centum of all money received during each fiscal year from the sale or other deposition of surplus wildlife, or of timber, hay, grass, or other spontaneous products of the soil, shell, sand, or gravel, and from other privileges on refuges established under sections 715–715d, 715e, 715f–715k, and 715*l*–715r of this title, * * * shall be paid at the end of such year by the Secretary of the

Treasury to the county or counties in which such refuge is situated, to be expended for the benefit of the public schools and roads in the county or counties in which such refuge is situated * * *.

Act No. 12, Louisiana Statutes of 1892:

AN ACT

To cede jurisdiction to the United States over certain land and for the purchase and condemnation thereof.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the United States shall have power to purchase or condemn in the manner prescribed by law, upon making just compensation therefor, any land in the State of Louisiana, not already in use for public purposes, required for custom houses, court houses, arsenals, national cemeteries, or for other purposes of the government of the United States.

Sec. 2. Be it further enacted, etc., That the United States may enter upon and occupy any land which may have been, or may be purchased or condemned, or otherwise acquired, and shall have the right of exclusive jurisdiction over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes, except the administration of the criminal laws of said State, and the service of civil process of said State therein, and shall hold the same exempt from all State, parochial, municipal, or other taxation.

Approved June 20, 1892.

U.S. GOVERNMENT PRINTING OFFICE: 1978